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AUTHOR Howe, Jonathan T.; Pearson, James W.
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ABSTRACT

This is one of several papers presented at a Federal Trade Commission Symposium on Media Concentration. It expresses views of the National Association of Advertising Publishers regarding problems that publishers of advertising shoppers and free newspapers encounter from chain-owned newspapers. Shoppers and free newspapers are described and differences from regular newspapers are noted. The growth of competition between shoppers and newspapers and the effect of concentration of ownership on paid newspapers is explored. It is suggested that in towns where the chain newspaper faces no competition, advertising rates soar; whereas in towns where the independent shopper offers competition, advertising rates stay firm or even go down. It is also contended that to the extent that shoppers continue to compete, it will be much easier for a new paid newspaper to enter the field. It is noted that the Association believes that interstate commerce regulations can apply to their problems. (HKM)

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BUREAU OF COMPETITION

MEDIA SYMPOSIUM--WORKSHOP ON MEDIA CONCENTRATION

December 14-15, 1978

Washington, DC

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Jonathan T. Howe

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Statement of The National Association of Advertising Publishers

Jonathan T. Howe, Esq.
Legal Counsel
Jenner & Block
One IBM Plaza
Chicago, Illinois 60611

James W. Pearson
Executive Vice-President
National Association of
Advertising Publishers
313 Price Place
Madison, Wisconsin 53705

AS 205269

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Statement of The
National Association of Advertising Publishers

The National Association of Advertising Publishers ("NAAP") welcomes the opportunity afforded by this Symposium to make known to the Federal Trade Commission, to other participants and observers of the Symposium, and to the public the problems faced by its members who vigorously compete for advertising revenues with paid circulation newspapers throughout the country. This Symposium is a particularly apt forum for an expression of NAAP's views because it is the growing concentration of ownership in the newspaper industry, and particularly the emergence of large profit-oriented newspaper "chains," which has caused newspaper publishers in many instances to overstep the bounds of fair play in their competition with NAAP's members.

NAAP

NAAP, now entering its 29th year, is a national trade association representing more than 500 publishers of

more than 1100 free community papers. The combined circulation of NAAP member publications exceeds 19 million weekly. Approximately 38% of NAAP's circulation is audited and that figure is increasing as a steady rate. The member publishers of NAAP are also active through 15 state and reagional associations. NAAP members do not belong to either the American Newspaper Association or the American Newspapers Publishers Association.

Most NAAP member publications are owned privately or by closely-held corporations. Average gross sales vary from $100,000 to $4,000,000 annually, with an average of $250,000. Although free community newspapers exist in most large cities, most NAAP members are located in smaller towns and rural areas. In short, free community newspapers are small, independent businesses of a type that is rapidly disappearing in many other industries.

Shoppers and Free Newspapers

"Free community paper" and "community service publication" are generic terms used interchangeably in the industry to refer to both "shoppers" and "free newspapers". Shoppers contain advertising almost exclusively while free newspapers contain coverage of local news as well as advertising. The distinction is often made with reference to

postal regulations. A free newspaper generally will include sufficient news and editorial material to make it eligible for mailing at "controlled circulation" rates (approximately 25% non-advertising material must be included), whereas a shopper will contain less than 25% or no non-advertising material and thus be eligible for mailing only at Third Class bulk rates. Shoppers are also known as shopping guides, advertisers, penny-savers, advisors, dollar-savers and reminders.

Both shoppers and free newspapers are mailed or delivered to every dwelling unit within a geographic market with no charge to recipients. Because of the mass market saturation provided, both shoppers and free newspapers are considered community service publications.

Free community papers are distinguished from newspapers in several ways. First, they are distinguished because they are free, normally not charging any subscription fee at all. The circulation is controlled and determined by the trading areas they are designed to serve. Newspapers are distributed only to paid subscribers. Free community papers are also distinguished from newspapers by the postal regulations. Newspapers are generally considered to be publications containing more than 25% news and editorial material, and thus eligible for mailing at Second Class rates.

Most importantly, free newspapers and shoppers are distinguished from paid newspapers by their effectiveness in penetrating the market. Free newspapers and shoppers are delivered to every dwelling within an area and thus achieve virtually 100% penetration of the market. Paid newspapers, which reach only subscribers, rarely achieve better than 50% penetration.

Growth of Competition Between Shoppers and Newspapers

Shoppers and free newspapers first appeared during the depression years to fulfill a need expressed by advertisers for total market or saturation coverage. Their most dramatic growth has occurred in the last decade and a half and is related to changes in the newspaper industry. Newspapers, as has been well documented both at this Symposium and elsewhere, for many decades have experienced a dramatic concentration of ownership. During this same period, two opposing forces have come to bear on newspapers: while circulation has leveled off or decreased, advertisers' need for total coverage of every market has risen. Newspaper publishers have hesitated to respond to advertisers' demands for total coverage because it is their belief that paid subscription is necessary, although it rarely covers even the cost of paper.

Shoppers and free newspapers, on the other hand, have had the flexibility to respond to advertisers' needs. Their coverage of a geographic market is complete; newspapers, as noted above, rarely achieve more than 50% penetration of the market. For the local advertiser, shoppers and free newspapers offer "zoned" or "sectionalized" coverage, so that an individual advertiser, usually a local merchant, can order advertising distribution to only that part of the total area of circulation which the advertiser believes to be the market for his particular product.

In their early days, all free community papers, but especially shoppers, suffered tremendously at the hands of paid newspaper publishers who referred to them as "throwaways," "junk mail," etc. -- all terms designed to convince advertisers that their products should not suffer association with such disreputable publications.

Many advertisers, however, were not put off by this adverse publicity and increasingly went to shoppers to get more effective penetration of the market. Thus, the battle lines were drawn.

The paid newspapers generally won the battle for national advertising. This is partly because paid newspaper publishers contrived to ban shoppers from membership in the Audit Bureau Circulation (ABC) whose

circulation audits were considered a prerequisite by national advertisers in the print media.

Shoppers were more successful in attracting local business. Their generally lower rates and effective saturation coverage are ideal for neighborhood merchants. Even at the local level, however, fierce battles were fought. For example, many states, with the lobbying assistance of paid newspaper publishers, have passed laws requiring that official legal notices be published only in newspapers "of general circulation" -- a term that is defined by these statutes to include only paid newspapers and to exclude shoppers and free newspapers.

Effect of Concentration of Ownership of Paid Newspapers

The disappearance of competing daily and weekly paid newspapers in most cities in this country, and the takeover of the remaining papers by large corporations who own many other newspapers, as well as other kinds of media, are facts now well known to the general public.

These changes in the structure of the newspaper industry, though going back several decades, have made their impact on shoppers and free newspapers only in the last 10 to 15 years.

The publishers of shoppers and free newspapers have always expected their competition to be tough -- in recent years they have not been surprised that it is also unfair.

The classic situation of "do-or-die" for the publisher of a shopper is now presented when the only remaining daily in town is acquired by a newspaper chain. It has sometimes been said that the acquiring corporation is attracted to the only paper in town because it has a "natural monopoly" and thus generates monopoly profits for its owner. Although the profitability of the paper certainly makes it attractive, the chain's managers are too knowledgeable to be fooled into believing that they have achieved a complete monopoly. There is still that shopper in town -- and whatever advertising dollars go to that shopper are, at least in theory, lost to the paid daily. Thus the chain newspaper's task is clear -- eliminate the independent shopper.

Before describing in more detail the kinds of things done by a chain-owned newspaper to drive a shopper out of business, it is necessary to address a few preliminary questions -- why should the harm suffered by shoppers at the hands of chain-owned paid newspapers be a matter of concern for the federal government? and, more particularly, is competition for advertising revenues a proper subject for inquiry by the Federal Trade Commission? And finally, if the chain newspaper has a monopoly, what is the relevant market?

Interstate Commerce

The competitive struggle between a shopper and a chain-owned newspaper is not just a fight for local advertising but is a matter of national importance. The publishers of shoppers and free newspapers in recent years have actively sought the assistance of the federal government to help them keep competition within the bounds of the law. To get this assistance, they must first show that their business is sufficiently involved with interstate commerce so that the Federal Trade Commission and the Antitrust Division of the Justice Department have jurisdiction under the Sherman Act, the Clayton Act, and the Federal Trade Commission Act.

The publishers of shoppers and free newspapers also realize, however, that they must do more than show that the bare jurisdictional requirements of the law are met. In addition, they must show that their problems are of sufficient national importance to warrant the attention of the FTC and the Antitrust Division -- both of which are agencies whose resources are limited and who must, therefore, devote their staff to matters of the highest priority.

Since the decision of the Fourth Circuit Court of Appeals in Greenville Publishing Co., Inc. v. The Daily Reflector, Inc., 496 F.2d 391 (4th Cir. 1974), there can be little doubt that the problems faced by a shopper in competition with a chain-owned paid daily are subject to the jurisdiction of the federal courts. The facts about the shopper in the Greenville case -- whose antritrust claim was found by the Court of Appeals to involve interstate

commerce -- are true of most shoppers and free newspapers. Both shoppers and paid newspapers derive their advertising revenues from both local and national concerns; as a result of the advertising, products are contracted and paid for and shipped through interstate commerce; both shoppers and paid newspapers obtain their printing materials from out-of-state. A further contact with interstate commerce is found when either the shopper or the paid newspaper is distributed by the federal Postal Service. Thus, under either of the commonly recognized theories of jurisdiction based upon involvement with interstate commerce -- conduct "within the fow" of interstate commerce or conduct which "affects" interstate commerce -- the shopper's competition problems with paid newspapers are clearly a proper subject of federal concern.

Further, shoppers are now getting more national and "co-op" advertising than ever before. More national advertising will go to shoppers as more become audited. The same is true with "co-op" advertising. Cooperative or co-op advertising involves local retailers who advertise national brands, partially with funds provided by the manufacturer for this purpose. This kind of local dissemination of interstate advertising is also part of interstate commerce.

Moreover, the Court in the Greenville case established that contact with interstate commerce is not determined by fucusing solely on the contacts which the victim of uncompetitive practices may have with interstate commerce, but also by looking at the interstate character of the market itself. As the Court stated, the Sherman Act was not designed to allow a party in interstate commerce to destroy local competition so long as it acted before the local competition captured any of the interstate market. Thus, "the Sherman Act applies to the alleged monopolization of the interstate market even though the immediate victim may not be engaged in interstate commerce." 496 F.2d at 396.

Advertising As A "Commodity"

NAAP is aware that the question whether newspaper advertising space is a "commodity" rather than a service, and thus subject to the ban on discriminatory pricing contained in section 2(a) of the Robinson-Patman Act, has been a matter of recent concern to the Commission. In re The Times Mirror Co., 1978 CCH Trade Regulation Reports ¶21,488 (Commission Docket No. 9103, Order of July 27, 1978). While the Commission's decision in the Times Mirror case may well subject many of NAAP's own members to charges of price discrimination, NAAP believes the Commission's decision was correct.

Relevant Market

The "geographic market" served by both a paid newspaper and its competing shopper is generally the same. It usually centers around a city or town and its surrounding marketing area. Although the newspaper usually serves a larger geographic area than does the shopper, many newspaper publishers have attempted to match the "zoned" coverage offered by shoppers by putting out their own "zoned" or sectionalized editions. It is only in recent years that advances in printing technology have allowed a daily newspaper to do this.

The "product market" served by both shoppers and paid newspapers are those individuals who wish to advertise by means of printed advertising delivered to the homes of consumers within the geographic area served by both the paid newspaper and the shopper. Despite some early confusion in the case law, see Huron Valley Publishing Co., Inc. v. Booth Newspapers, Inc., 336 F.Supp. 659 (E.D. Mich. 1972), it is quite clear that for purposes of defining the relevant market the print media are sufficiently distinct from the electronic and other kinds of media. Although all advertising performs the same function of introducing and maintaining public awareness of a product, it is more than obvious to persons in the industry that some forms of advertising are vastly preferable to others

because of cost effectiveness and other factors. Thus, in allocating advertising costs, retailers and others generally consider the print media as a separate market.

Abuses By Chain-Owned Paid Newspapers in Competition with Independent Shoppers

The reasons for the intensification of the competition between shoppers and paid newspapers are probably as complex as those for the concentration of ownership in all types of industry in this country. Nevertheless, a few factors specific to the newspaper industry can be pinpointed. First, as noted above, advertisers in the print media have come to expect and demand complete or total market coverage (often known as "TMC"). Paid newspapers have made several attempts to respond to this demand, not all of them successful. One response is the increasing use of advertising inserts (often pre-printed). These inserts provide the advertiser with a format that may not be available in the regular sections of the paper. Further, these inserts can also be distributed independently -- in piles in the supermarket, by delivery to homes, etc. Thus, distribution of the insert is not limited to the newspapers' subscription circulation.

Another kind of response is the appearance of "zoned" editions of the newspaper, each geared to a particular area of the town with neighborhood and other local news items. These zoned editions offer the local advertiser a tailored market that previously had been

offered only by the shopper. Not by chance, a paid newspaper's zoned editions most often coincide exactly with the different market zones offered by the competing shopper.

The third kind of response to advertisers' demands for total market coverage is the most recent to appear, and, by hindsight at least, is the most obvious. The best way to compete with a shopper is with another shopper. This is the technique favored by chain-owned newspapers. This is also the practice which spawns the most serious anti-competitive and illegal practices.

First of all, it should be realized that most publishers of chain-owned newspapers do not want to go into the shopper business. Rather, they wish to finance their own shoppers until the competing independent shoppers have been run out of business. When the competition is thus eliminated, the chain owner of the paid paper will cease publication of its shopper, thus leaving the paid newspaper with a complete monopoly of advertising in the print media. If there could be any doubt whether this intent to monopolize can be inferred from the actual past practices of chain newspapers, that doubt is removed by the advice given to paid newspaper publishers in trade publications on how to introduce their own shoppers. For example,

> And in the situation of an established weekly starting its own shopper, it should be written into the corporate minutes at the very beginning that the purpose is to make a profit . . . 'then, down the road, if somebody sues you,' you have a record that 'you weren't trying to cut someone else out. . . you were just trying to make money.'
>
> "Antitrust law: make sure you get good advice," Publishers' Auxiliary, November 27, 1978, Page 5.

The chain newspaper's intent to drive the shopper out of the business altogether (as distinguished from wanting to get a fair share of the market) can be inferred from many specific acts and practices. Among the more egregious are the following:

A. Tying. Although the practice is so obviously illegal, in many instances a chain newspaper starting its own shopper will require advertisers to place ads in both the newspaper and the shopper. The advertisers swallow this arrangement because the combination rate is often so low that the additional circulation provided by the shopper appears worth the price. Most chain newspapers are sophisticated enough not to require that ads be placed in both publications, but accomplish the same result with attractive combination rates which make it difficult for the advertiser to turn down the shopper in favor of the still high rates charged for the newspaper alone.

A less direct form of tying occurs when the chain-owned newspaper offers a progressively increasing discount for successive runs of an ad in both the newspaper and shopper which eventually serve to bring the price of advertising in both publications below the price of advertising in either one alone.

B. Sales Below Cost. Newspaper chains have the financial strength to offer ads below cost for as long as it takes to drive a competing shopper out of business. The difficulty in proving this abuse lies in ascertaining the chain publisher's variable costs of putting out its own shopper. Generally, if a publisher already has the plant to put out a newspaper, then the additional cost of putting out a shopper is very slight.

Even as to materials such as paper, ink, chemicals, plates, film, and so forth, which probably can be clearly allocated to the shopper, the chain publisher has the advantage over the independent shopper because it purchases these materials in great volume. Further, if the chain owns or controls its own suppliers, some materials such as paper can be purchased for the shopper at prices below market

Labor costs for running the printing press and producing the films and plates in the pre-press area might be substantially reduced for a shopper published by a chain newspaper, since the necessary personnel are already employed in putting out the paid newspaper.

Similarly, it is difficult to allocate sales cost where the same salespersons sell ads for both the newspaper and the newspaper's own shopper. This problem pertains to every level of the administration.

The allocation of costs is always a difficult problem and especially difficult in the newspaper industry. NAAP welcomes the FTC's recent inquiries in this area (see Times Mirror decision, referred to above) and hopes that the Commission will utilize the expertise it gains to examine sales below costs made by chain-owned shoppers in competition with independent shoppers.

Miscellaneous Abuses

Several other particular kinds of unfair trade practices have surfaced in the struggle between shoppers and paid newspapers such as disparagement of customers, improper solicitation of a competitor's employees, etc. While these abuses are common to all types of industry, there are others which are peculiar to the newspaper industry. A few examples are provided:

A. Violation of Postal Service regulations. As noted above, paid newspapers which are delivered through the mail generally enjoy Second Class mailing privileges while shoppers and free newspapers are mailed at Third Class bulk rates which are often 5 to 20 times higher than the rates for Second Class. While the mailing privileges accorded to paid newspapers originally served to protect the existence of an independent press, it now

serves as a "privilege" in the worst sense of the term -- a special right granted to one group of persons (paid newspapers) and arbitrarily withheld from another (shoppers).

However, paid newspapers are not content with the privilege granted them by law -- they have gone further and violated the regulations governing exercise of the Second Class mailing privilege. As noted above, one of the paid newspaper's responses to the competition offered by the shoppers is the inclusion of advertising inserts (often pre-printed) in editions of the paper. Postal regulations permit the insertion of separate advertising material in a newspaper mailed at Second Class rates only if the advertising insert can fairly be characterized as a "supplement" which is "germane" to the rest of the paper. The regulations are not a model of clear drafting, and some postmasters have taken advantage of the regulations' lack of clarity in refusing to enforce the regulations against publishers who mail advertising inserts which are not "germane" to the rest of the paper under any difinition of the term. For example, several Second Class newspapers in a given area will include an identical insert in their weekend editions. How can this insert be "germane" to each of several different papers? Similarly, a publisher often will include an advertising insert as a "supplement"

to an edition of a Second Class newspaper and at the same time distribute many thousand more copies of the insert separately, as an independent publication. How can this insert be defended as a "supplement" to the paper at the same time it is distributed as an independent publication? This abuse of the postal regulations relating to inserts is only one of many serious abuses perpetrated by newspaper publishers who mail at the privileged Second Class rates.

B. Child labor laws. The Fair Labor Standards Act, 29 U.S.C. §2201 et seq., enacted in 1938, among its other provisions, set severe restrictions on the use of child labor. Section 213 of the Act set forth the exemption to the child labor provisions and exempted children engaged in the "delivery of newspapers." Prior to the 1949 amendments to the Act, shoppers were not considered by the Department of Labor to be newspapers within the meaning of the statute. However, because the legislative history of the 1949 amendments indicated Congress' clear intent to exempt delivery boys of shoppers as well as paid newspapers, the Department of Labor amended its regulation to include a specific exemption for shopper delivery boys.

Despite this clear legislative and administrative position, from time to time the Department of Labor has filed complaints against publishers of shoppers alleging

violations of the child labor laws for employing minors under the age of 16. The Department's position in these complaints is that the shopper does not come within the "newspaper" exemption since it does not contain sufficient (or any) news or editorial material.

The proven defense to such a complaint is the Department of Labor's own regulations and to point out who is behind the complaint. Frequently, it is the paid newspaper which is in competition with the shopper.

C. Anti-Litter laws. Many shoppers found that mailing costs at Third Class rates were prohibitive and, therefore, developed their own private delivery systems. In this area, shoppers have faced a different threat -- anti-litter ordinances. These laws generally take the form of prohibiting the hand delivery of advertising material to any home without the owner's prior consent. By their stated exemptions, e.g., advertisements for charitable organizations, and by their sponsors, which most often include the publishers of paid newspapers, it is clear that these laws are directed against shoppers. Although shoppers in the past have had only partial success in combating anti-litter laws, the tide is turning in their favor. Recent Supreme Court decisions had made it clear that "commercial speech" -- i.e., advertising --

like political and religious expression, is entitled to some protection under the First Amendment. Generally speaking, an anti-litter law today will withstand an attack on First Amendment grounds only if it carefully addresses itself to regulating the time, place and manner of hand delivery of advertising material, rather than prohibits this method of distribution altogether.

The NAAP realizes that all the abuses related above cannct be remedied by the Federal Trade Commission. However, it is important to point out these abuses so that the Federal Trade Commission and the Antitrust Division can more comprehensively evaluate the struggle between shoppers and chain-owned paid newspapers in light of the many factors which put shoppers at a competitive disadvantage.

The Illegal Competition Offered by Chain Newspapers to Independent Shoppers is a Matter of National Concern

NAAP member publishers, like many businessmen engaged in a fierce competitive struggle, sometimes do not distinguish between legal and illegal competitive practices. It is often difficult for businessmen not trained in the law to understand that the antitrust laws and the Federal Trade Commission Act are designed to protect competition, not competitors.

Nevertheless, NAAP believes that the practices described above are sufficiently serious and widespread to warrant federal aid to correct the situation. There are several reasons which make this situation one that should be a matter of priority for the Commission and the Anti-trust Division.

First, there is the general service done to the public in preventing a complete monopoly of advertising in the print media by chain-owned newspapers. Advertising costs are already high; if shoppers are eliminated, the chain newspapers, after eliminating their own shoppers, will settle into their monopoly and begin to charge monopoly prices. The tendency has already manifested itself. In towns where the chain newspaper faces no competition, advertising rates soar. In towns where the independent shopper offers competition, advertising rates stay firm or even go down as the competition between the paid paper and the shopper intensifies.

The chain newspaper corporations are certainly national in the scope of their business. What must be realized is that their only competition is the independent shopper in each town. The Commission cannot stand by and let these relatively small businessmen by "picked off" one by one on the pretext that each town involves only a "local" situation.

It is also important to realize that the chain-owned newspapers will not get competition from their own kind. It is extremely costly for a second paid newspaper to enter the market. The reasons are many and complex, but one major reason is that a paid newspaper cannot afford the time to establish a paid circulation necessary to attract advertising revenues. The close relationship between advertising revenue and paid circulation is one reason competing dailies have disappeared in most towns -- if you lose circulation, you lose advertising, and you can never get out of the hole once you have fallen in it.

Shoppers, on the other hand, offer "instant" competition. A shopper does not have to build up a paid circulation -- it can saturate a market immediately.

The corporate owners of chain newspapers have been heard to say that any federal or other governmental scrutiny of illegal uncompetitive practices in their business is forbidden by the First Amendment guarantee of an independent press. Not only is this argument unfounded, but the same argument supports the opposite result.

It has been over three decades since the Supreme Court laid to rest any doubts as to whether paid newspaper publishers were subject to the federal laws protecting competition. Although the facts in Associated Press v.

United States, 326 U.S. 1 (1944) were different from those involved in the competition between chain newspapers and shoppers, the Court's pronouncement about the coverage of the antitrust laws is applicable (326 U.S. at 7):

> Member publishers of AP are engaged in business for profit exactly as are other businessmen who sell food, steel, aluminum, or anything else people need or want . . . all are alike covered by the Sherman Act. The fact that the publisher handles news while the others handle food does not, as we shall later point out, afford the publisher a peculiar constitutional sanctuary in which he can with impunity violate laws regulating his business practices.

The Court later in its opinion made an argument applicable here. First pointing out that the First Amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society," 326 U.S. at 20, the Court then argued that application of the antitrust laws to the newspaper industry promotes the goals of the First Amendment by insuring the "diversity" of the press -- i.e., by acting to prevent a monopoly in the press.

Similarly, in this case, the laws ensuring fair competition should be enforced against chain-owned newspapers who compete unfairly with independent shoppers, in order to promote the diversity of the press. While

shoppers do not compete with newspapers for news and comment, they are the only competition for advertising revenues. To the extent that shoppers continue to compete it will be that much easier for a new paid newspaper to enter (or re-enter) the field.

Respectfully submitted,

National Association of
Advertising Publishers

By: _____

Jonathan T. Howe
Legal Counsel
Jenner & Block
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350